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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

COUNTER WRAPS INTERNATIONAL, INC., )  
Plaintiff, )  
vs. )  
DIAGEO NORTH AMERICAN INC., et al., )  
Defendants. )

Case No. 2:16-cv-02924-JCM-CWH  
**ORDER**

13 Before the Court are Plaintiff Counter Wraps International's (CWI) Motion to Modify the  
14 Court's Scheduling Order and for Leave to file an Amended Complaint (ECF Nos. 22, 24), filed  
15 October 11, 2017, Defendants Diageo North America, Inc. and Diageo Americas, Inc.'s (Diageo)  
16 Opposition (ECF No. 25), filed October 27, 2017, and CWI's Reply (ECF No. 27), filed November  
17 3, 2017.

18 This is a contract dispute between the parties regarding the purchase of advertising signage  
19 for Diageo's product called Nuvo, and the alleged failure to pay money owed. After removal from  
20 state court, a discovery plan and scheduling order required that motions to amend pleadings and  
21 add parties be filed by April 13, 2017. (Order (ECF No. 15).) The parties later stipulated to modify  
22 the scheduling order, and except for the modification of the deadline to amend the pleadings, the  
23 Court agreed with the modification. (Order (ECF No. 21).) The Court denied the request to extend  
24 the deadline to amend pleadings because excusable neglect had not been shown. *Id.* The other  
25 deadlines were again extended, and the close of discovery was November 9, 2017.

26 Plaintiff claims that it now has good cause and has shown excusable neglect to allow the  
27 amendment of the pleadings. It argues that after the deadline for amended pleadings, it received  
28 documents and took a deposition that support previously unknown fraud claims. Diageo opposes

1 the motion, arguing that the amendment is untimely, prejudicial, and futile.

2 The motion is granted because there is good cause and excusable neglect to permit the  
3 belated amendment. The parties are directed to jointly submit a new proposed discovery plan and  
4 scheduling order.

## 5 I. DISCUSSION

6 Rule 15(a)(2) of the Federal Rules of Civil Procedure, regarding the amendment of  
7 pleadings, directs that “[t]he court should freely give leave when justice so requires.” The Ninth  
8 Circuit Court of Appeals has repeatedly cautioned courts in this circuit to “liberally allow a party to  
9 amend its pleading.” *Sonoma Cnty. Ass’n of Ret. Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th  
10 Cir. 2013). “Courts may decline to grant leave to amend only if there is strong evidence of ‘undue  
11 delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by  
12 amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of  
13 the amendment, or futility of amendment, etc.’” *Id.* at 1117 (*quoting Foman v. Davis*, 371 U.S. 178,  
14 182 (1962)).

15 When leave to amend is sought after the amendment deadline in the court's scheduling order  
16 has expired, the movant must also show good cause to reopen the amendment period and excusable  
17 neglect for the delay. *See* Fed. R. Civ. P. 6(b)(1)(B) (stating “the court may, for good cause, extend  
18 the time . . . on motion made after the time has expired if the party failed to act because of  
19 excusable neglect.”). In evaluating excusable neglect, the court weighs: “(1) the danger of  
20 prejudice to the non-moving party, (2) the length of the delay and its potential impact on judicial  
21 proceedings, (3) the reason for the delay, including whether it was within the reasonable control of  
22 the movant, and (4) whether the moving party’s conduct was in good faith.” *Pincay v. Andrews*,  
23 389 F.3d 853, 860 (9th Cir. 2004) (citing *Pioneer Investment Services Co. v. Brunswick Associates*  
24 *Limited Partnership*, 507 U.S. 380, 395 (1993)). The weight assigned to these factors is left to the  
25 court’s discretion. *Id.*

26 CWI has demonstrated the good cause and excusable neglect necessary to reopen the  
27 amendment period under the scheduling order. The deadline for amending the pleadings was April  
28 13, 2017. (Order (ECF No. 15).) CWI represents that Mr. Yakoby, an agent of Diageo, induced it

1 to accept below market unit pricing and to absorb start up costs because it anticipated certain levels  
2 of performance. Documents to support this claim were produced on July 28, 2017, just prior to the  
3 deposition of Mr. Yakoby, and three months after the deadline to amend passed. (Motion (ECF  
4 Nos. 22, 24) at 4.) Because CWI was not fully aware of this basis for new claims until after the  
5 amendment deadline passed, CWI could not have filed a timely motion to enlarge the deadline  
6 before it expired. There is no basis for a finding that the timing of CWI's motion to amend shows  
7 undue delay, bad faith, or dilatory motive on its part. CWI has sufficiently demonstrated that the  
8 delay was not the result of bad faith but rather the result of the discovery process which yielded  
9 documents it did not otherwise possess.

10 Diageo argues that it will be prejudiced by the amendment and subsequent reopening of  
11 discovery. The burden to show prejudice rests with Diageo. *See DCD Programs, Ltd. v. Leighton*,  
12 833 F.2d 183, 187 (9th Cir. 1987). Diageo has not met this burden. The core case is still about the  
13 enforcement of the Nuvo contract. Discovery only recently closed on November 9, 2017, during  
14 the pendency of this motion. Although Diageo claims that it will be required to pursue discovery  
15 "from scratch," the parties disagree on the amount of discovery that must be conducted as to the  
16 additional claims. Based upon Diageo's assertion that witnesses are unable to recall the events of  
17 the contract formation, it is likely that the documents produced will become the basis for the claims  
18 and defenses. The amount of additional discovery needed in light of new claims is therefore  
19 unclear. Diageo argues that CWI waited until just before the statute of limitations expired on its  
20 claim, and the result is that some evidence may no longer be available. Of course, this problem  
21 cuts both ways, and is not a basis to prevent amendment.<sup>1</sup> The passage of time is not reason  
22 enough to preclude amendment. *See, e.g., Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798  
23 (9th Cir. 1981) ("Ordinarily, leave to amend pleadings should be granted regardless of the length of  
24 time of delay by the moving party absent a showing of bad faith by the moving party or prejudice to  
25 the opposing party.").

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28 <sup>1</sup> If the spoliation of evidence by either side is an issue, it is not before the court at this time, and  
therefore is not considered here.

Diageo's futility arguments are unpersuasive. It argues that the amendment to add the fraud claims are time barred by a three-year statute of limitations because CWI was at fault for not knowing about the alleged fraudulent conduct that was discovered in the Yakoby documents. If CWI was unaware of the fraud, however, the statute of limitations defense may not prevail, and the amendment would not be futile. These are factual issues to resolved in a different setting.

Diageo also contends that evidence produced in this litigation disproves CWI's theory. But futility is not determined from an analysis of the evidence, it is based on the sufficiency of the allegations. "A proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (the proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)). Diageo has not shown that CWI could not state plausible claims, just that it expects it cannot ultimately prove them.

## II. CONCLUSION

IT IS THEREFORE ORDERED that the Motion to Modify the Court's Scheduling Order and for Leave to file an Amended Complaint (ECF Nos. 22, 24) is GRANTED. CWI must file its First Amended Complaint in the format proposed at ECF No. 24-1 by November 29, 2017, and promptly serve it.

IT IS FURTHER ORDERED that the parties must meet and confer and file a proposed modification of the discovery plan and scheduling order by December 13, 2017.

DATED: November 22, 2017

  
C.W. Hoffman Jr.  
United States Magistrate Judge